

# **Mexico's Request for an Advisory Opinion on Responsibilities Stemming from the Firearms Industry**

## **Submission to the Inter-American Court of Human Rights By the Essex Business and Human Rights Project**

### **List of Acronyms**

ACHR: American Convention on Human Rights

ATT: Arms Trade Treaty

BHR: Business and Human Rights

EBHR: Essex Business and Human Rights Project

HRDD: Human Rights Due Diligence

IHL: International Humanitarian Law

IHRL: International Human Rights Law

OSCE: Organisation for Security and Co-operation in Europe

OECD: Organisation for Economic Co-Operation and Development

UNGPs: United Nations Guiding Principles on Business and Human Rights

### **A. The Interest of the Essex Business and Human Rights Project in this Advisory Opinion**

1. The Essex Business and Human Rights Project ('EBHR') is a research hub housed in the University of Essex Human Rights Centre (United Kingdom). Active since 2010, EBHR uses academic research to inform policy developments on issues related to Business and Human Rights (BHR) at the local, national, regional, and international levels. Its co-Directors, Drs Tara Van Ho and Anil Yilmaz Vastardis, are internationally recognised scholars with collectively more than twenty-five years of experience in BHR. Amongst their areas of expertise is Business and Human Rights ('BHR') in situations of armed conflict and post-conflict societies. Dr Van Ho has previously spoken at the Conference of States Parties of the Arms Trade Treaty and at other events on the BHR responsibilities attendant to the arms trade. EBHR respectfully and humbly submits this brief to this Court in hopes of supporting the Court's ongoing efforts to ensure States Parties understand their responsibilities in the context of BHR.<sup>1</sup>

2. States have often been reticent to recognise that the same human rights responsibilities that attach to other industries also attach to the arms trade. This reticence seems to reflect a recognition that firearms and other conventional weapons are inherently dangerous, but

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<sup>1</sup> This brief was prepared for EBHR by Dr Van Ho with the assistance of Egle Martins Spina.

most states want access to these arms to ensure their collective security and right to self-defence as enshrined in the Charter of the United Nations<sup>2</sup> and Charter of the Organisation of American States.<sup>3</sup> The legitimate need for arms, however cannot and does not override the State's obligations to regulate the arms industry adequately and effectively for the protection of human rights, nor should it excuse the independent responsibility on each business in the industry to respect human rights.<sup>4</sup> Instead, the inherently dangerous nature of firearms coupled with the need of states to secure access to firearms for their individual and collective self-defence merely requires a realistic adaptation of the existing obligations on states and responsibilities on businesses to the particularities of the arms trade.

3. In this brief, EBHR explores the existing obligations and responsibilities under international human rights law ('IHL') and explains what a realistic adaptation to the arms industry would look like. In doing so, we base our discussion of state obligations primarily on this Court's jurisprudence, but we reference other systems when they align with or complement this Court's work. In discussing the responsibility of business actors, we invoke the United Nations Guiding Principles on Business and Human Rights ('UNGPs'), which have been widely embraced by states and businesses. This Court has also acknowledged the authoritativeness of the UNGPs.<sup>5</sup> It is our position that the business responsibility to respect human rights is now emerging customary international law and, as such, is a relevant standard for international law.

4. In the remainder of the brief, we first identify the range of human rights at risk (Part B), and then identify the actors of the arms trade and note the interplay between IHL, international humanitarian law ('IHL'), and the treaties specific to the arms trade (Part C). We then examine States' existing IHL obligations in the context of the arms trade (Part D), and the extent to which those obligations apply extraterritorially (Part E). Finally, we discuss the

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<sup>2</sup> Articles 2(4) and 51.

<sup>3</sup> Article 1.

<sup>4</sup> 'Business' is used here to broadly refer to any for-profit actor or activity regardless of its legal personality or organisational structure, including informal actors. The 'industry' refers to the collection of businesses and states engaged in the arms trade from design through transportation and use.

<sup>5</sup> *Miskito Divers (Lemmo Morris et al.) v Honduras*, Judgment of August 31, 2021, para 48.

independent responsibility of businesses to respect human rights and call on this Court to formally recognise this responsibility for the arms sector (Part F). In sections D-F, we discuss the application of these obligations to the arms trade, providing a non-exhaustive list of actions that can be reasonably expected of States and businesses.

5. Given the number of interventions we expect this Court to receive, we have intentionally kept our submission brief, but we remain available to the Court to answer any questions.

## **B. The Relevant Human Rights**

6. The United Mexican States ('Mexico') has already identified in its request the range of human rights most directly implicated by the arms trade. We affirm this list for the firearms trade and would note that many of the issues raised by the firearms trade will be raised by the manufacture, sales, transport, or use of other conventional weapons.

7. Firearms, both individually and as part of the broader arms trade, can also implicate additional human rights that should be considered in the due diligence of any State and relevant business. Under the American Convention on Human Rights (ACHR), other implicated rights include<sup>6</sup>: freedom from slavery (art 6),<sup>7</sup> equal protection (art 24), freedom of conscience and religion (art 12), and freedom of thought and expression (art 13),<sup>8</sup> the right

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<sup>6</sup> Footnotes 6-10 are representative of the types of harms that should be considered during due diligence processes. We are not submitting that there were human rights violations in each of these cases, nor are we ascribing wrongfulness to any individual mentioned in the articles.

<sup>7</sup> See, e.g., Jess Staufenberg, "Mexican woman sold into sex slavery told 'customer' who put gun in her mouth to end her misery," *The Independent* (9 February 2016), <https://www.independent.co.uk/news/world/americas/mexican-woman-sold-into-sex-slavery-told-customer-who-put-gun-in-her-mouth-to-end-her-misery-a6862696.html>.

<sup>8</sup> See, e.g., Peter Smith, "Gunman who killed 11 in a Pittsburgh synagogue found eligible for death penalty" *PBS* (13 July 2023), <https://www.pbs.org/newshour/nation/gunman-who-killed-11-in-a-pittsburgh-synagogue-found-eligible-for-death-penalty>; Dennis Romero and Anthony Cusumano, "Death sentence upheld for Dylann Roof, who killed 9 in South Carolina church shooting" *NBC News* (26 August 2021), <https://www.nbcnews.com/news/us-news/death-sentence-upheld-man-who-killed-9-south-carolina-church-n1277667>; "Christchurch mosque attack suspect pleads not guilty, trial set for next year" *Reuters / NBC News* (14 June 2019), <https://www.nbcnews.com/news/world/christchurch-mosque-attack-suspect-pleads-not-guilty-trial-set-next-n1017466>.

to property (art 21),<sup>9</sup> the right to participate in government (art 23),<sup>10</sup> and progressive development of the range of economic, social and cultural rights (art 26).<sup>11</sup> It is our position that the underpinning obligations and responsibilities for States and businesses with regard to due diligence and reparations remain consistent across the range of human rights violations.

8. In situations of armed conflict, IHRL continues to apply to the arms trade, but the definition of certain rights (ie, the right to life) are defined with reference to IHL as *lex specialis*.

9. Given the widespread and irremediable risks to a number of human rights, it is appropriate to recognise the design, production, sale, transfer, and/or use of firearms as inherently dangerous. This inherent danger does not necessarily require the prohibition of all firearms, but it should inform the measures States are obligated to take.

### **C. Arms Trade Actors and the Appropriateness of Systemic Integration of Human Rights and Humanitarian Law into the Arms Trade**

10. Throughout this brief, the ‘arms trade’ refers to the network of state and non-state actors who request, design, produce, sell, transfer, and transport firearms and other conventional

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<sup>9</sup> See, e.g., Jaskiran Dhillon, ‘Exclusive: Canada police prepared to shoot Indigenous activists, documents show,’ *The Guardian* (20 December 2019), <https://www.theguardian.com/world/2019/dec/20/canada-indigenous-land-defenders-police-documents>; Nina Lakhani, ‘Costa Rica indigenous leader shot amid tensions over land rights’ (17 February 2020), <https://www.theguardian.com/world/2020/feb/17/costa-rica-indigenous-leader-shot-land-rights>.

<sup>10</sup> Christy Coonery & Vanessa Buschschlüter, ‘Candidate in Ecuador’s Presidential election Fernando Villavicencio shot dead,’ *BBC* (11 August 2023), <https://www.bbc.co.uk/news/world-latin-america-66457472>; Tom Jackman, Rachel Weiner, and Spencer S. Hsu, ‘Evidence of firearms in Jan. 6 crowd grows as arrests and trials mount,’ *The Washington Post* (8 July 2022), <https://www.washingtonpost.com/dc-md-va/2022/07/08/jan6-defendants-guns/>; ‘Germany to tighten gun laws after suspected coup plot, interior minister says,’ *Reuters* (11 December 2022), <https://www.reuters.com/world/europe/germany-tighten-gun-laws-after-suspected-coup-plot-minister-2022-12-11/>.

<sup>11</sup> Sudarshan Varadhan, ‘No Warning: Witnesses describe how Indian police shot and killed smelter protesters,’ *Reuters* (29 May 2018), <https://www.reuters.com/article/us-vedanta-smelter-insight/no-warning-witnesses-describe-how-indian-police-shot-and-killed-smelter-protesters-idUSKCN1IU1X2>; Camilla Veras Mota, ‘Brazil school attacks: ‘I always look for places to hide,’’ *BBC News* (5 May 2023), <https://www.bbc.co.uk/news/world-latin-america-65414865>; Rebecca Boone, ‘Attacks at US medical centers shows why health care is one of the nation’s most violent fields’ *AP News* (7 August 2023), <https://apnews.com/article/hospitals-workplace-violence-shootings-aa6918569ff8f76ff8a15b9813e31686>.

weapons in accordance with international and national law.<sup>12</sup> Additionally, there is an ‘illicit arms trade,’ made up of individuals and organisations (sometimes including states and businesses) who manufacture or traffic weapons in breach of national or international law.

11. The *Arms Trade Treaty* (2013) (‘ATT’) was developed principally to facilitate a consistent regulation of the licit arms industry that would allow states to secure and trade the weapons necessary for self-defence while limiting the illicit trade. The ATT obligates home states to issue export licenses before firearms or other conventional weapons can be transferred out of the state’s territory.<sup>13</sup>

12. Within the preamble and within the text of the ATT, there is an explicit recognition that States Parties to the ATT are bound by international law on the use of force (*jus ad bellum*), IHRL, and IHL.<sup>14</sup> In particular, while there is a presumption in the ATT that home states should facilitate the export of weapons, they are prohibited from doing so if the transfer of arms would violate *jus ad bellum* rules, or if the weapons would be used to commit or facilitate serious violations of IHRL or IHL.<sup>15</sup> Before issuing an export license, the state is obligated to assess whether the weapons are likely to be used to, *inter alia*, “contribute to or undermine peace and security” or “commit or facilitate a serious violation” of IHRL or IHL.<sup>16</sup> If the transfer would do so, the state then must assess whether mitigation measures could address this risk; if not, and there remains an “overriding risk” of these harms materialising, the State is obligated to refuse the export license.<sup>17</sup> Notably, the ATT obliges states to make these assessments with a view to the likelihood that the arms will be “used to commit or facilitate

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<sup>12</sup> For a comprehensive discussion of actors, see “Responsible business conduct in the arms sector: Ensuring business practice in line with the UN Guiding Principles on Business and Human Rights: Information note by the UN Working Group on Business and Human Rights,” (2022) 2-3, <https://www.ohchr.org/sites/default/files/2022-08/BHR-Arms-sector-info-note.pdf>

<sup>13</sup> Articles 5-7.

<sup>14</sup> Preambular paragraph 6, Principles, and articles 6, 7.

<sup>15</sup> Articles 6 and 7.

<sup>16</sup> Articles 6, 7(1).

<sup>17</sup> Article 7(3).

serious acts of gender-based violence or serious acts of violence against women and children.”<sup>18</sup>

13. It is, therefore, appropriate to seek a coherent application of IHRL and IHL to the lawful arms trade with the ATT serving as *lex specialis* only if there are irresolvable conflicts. As acknowledged by separate draft working papers from the Presidency of Ninth Conference of States Parties to the Arms Trade Treaty (Republic of Korea)<sup>19</sup> and jointly Austria, Ireland, and Mexico,<sup>20</sup> there are no irresolvable conflicts between the ATT and IHRL or IHL. Instead, and as detailed below, it is possible and appropriate to achieve systemic integration of these areas where a State is Party to both the American Convention on Human Rights and the ATT.

14. In addition to the ATT, states have committed to eradicating the development, sale, transfer or use of illicit arms in the United Nations’ *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition* (2001) (‘the Firearms Protocol’).<sup>21</sup> Yet, many of the weapons used illicitly today were once lawfully produced, sold or transferred.<sup>22</sup> These weapons may have been illegally diverted from the lawful trade. According to the United Nations High Commissioner for Human Rights, “there were approximately 750 million diverted firearms in the hands of civilians in 2017, vastly outweighing the number of firearms estimated to be owned by the military and law enforcement sectors combined.”<sup>23</sup> When considering the IHRL impacts of the illicit arms trade, both States Parties and businesses should be aware of how their lawful conduct can facilitate unlawful activity, including the diversion of licit harms, and harm human rights.

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<sup>18</sup> Article 7(4).

<sup>19</sup> ATT/CSP9/2023/PRES/755/PM2.WP (21 April 2023) at fn 2 and accompanying text.

<sup>20</sup> ATT/CSP9/2023/AUT-IRL-MEX/774/Conf.WP (10 August 2023).

<sup>21</sup> The Firearms Protocol is an optional protocol to the United Nations *Convention against Transnational Organized Crime* (2000).

<sup>22</sup> “Impact of arms transfers on human rights; Report of the United Nations Commissioner for Human Rights” UN Doc. A/HRC/44/29 (19 June 2020), para 5.

<sup>23</sup> *Ibid.*

#### D. States' Existing IHRL Obligations over the Arms Trade

15. As this Court has recently stated, “[t]he obligation to ensure the rights recognized in the American Convention entails the duty of States to prevent violations of these rights” through the exercise of due diligence.<sup>24</sup> It is well-established in IHRL that states can incur international responsibility when they fail to exercise due diligence to prevent abuses by non-state actor.<sup>25</sup>

16. The duty to prevent in the context of firearms entails the same standards as those applied in the context of environmental harms.<sup>26</sup> An obligation of conduct rather than outcome, a State is expected to respond to the harms posed by firearms and the firearm industry with measures that are appropriate and proportionate to the real, anticipated, or perceived threats to human rights. States are, therefore, not responsible for preventing all negative impacts on human rights caused by firearms, but they are expected to act with care and diligence to ensure they are both aware of threats to human rights and responds to those threats appropriately.

17. Where a State’s due diligence has not effectively prevented a violation, the State must undertake an appropriate investigation and, where appropriate, prosecution and punishment of those involved in the abuse of human rights.

18. As the threat to human rights by the arms trade is great, the measures taken by States to prevent those harms from materialising must also be great. While there are a number of ways in which States can comply with their duty to prevent, it should be expected that states will adopt regulatory measures within their territory that include, *inter alia*:

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<sup>24</sup> The Environment and Human Rights, Advisory Opinion OC-23/17 of November 15, 2017, para 127

<sup>25</sup> See, e.g., Case of Velásquez Rodríguez v. Honduras, Series C No. 4, Judgment of July 29, 1988, para 172; Human Rights Committee, *William Eduardo Delgado Páez v Colombia*, U.N. Doc. CCPR/C/39/D/195/1985 (1990); European Court of Human Rights, *Case of López Ostra v Spain*, Application no. 16798/90 (1994); African Commission on Human and Peoples’ Rights, *Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, Communication 155/96 Decision of October 27, 2001, para 53; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, I.C.J. Reports 2007 (Judgment of 6 February 2007), para 430; Committee on Economic, Social and Cultural Rights, “General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, U.N. Doc. E/C.12/GC/24 (2017), paras 12-22.

<sup>26</sup> See, The Environment and Human Rights, Advisory Opinion OC-23/17 of November 15, 2017, paras 142-143.

- Ensuring state agencies regulate the design, production, sale, transfer, or use of firearms, including:
  - Recognising a distinction between the types of weapons that serve military and security purposes and those that are primarily for domestic protection or for hunting and gaming.
  - Ensuring the design of firearms includes sufficient safety devices to prevent the accidental or mass firing of a weapon in a way unnecessary for its primary purpose before they reach the market (ie, military uses may require more automatic firings than civilian purposes).
  - Regulating the sale of weapons to ensure they are not purchased or obtained by individuals who are likely to commit violations of IHRL or IHL, or are likely to otherwise misuse the weapon in a way that harms human rights. This may include limiting the types of firearms that can be sold or purchased, the types of ammunition that can be sold or purchased, or the individuals who are given a license to purchase or sell firearms.
  - Allowing for judicial review of licensing decisions, with legal standing to challenge a decision before administrative or civil courts for affected communities, civil society, and non-governmental organisations.<sup>27</sup>
  - Ensuring independent oversight of firearms sales and distributions, including through National Human Rights Institutes, special commissions, or other independent mechanisms.
  - Investigating, and where appropriate prosecuting and punishing, those responsible for the diversion of lawful weapons.
- Adopting legislation to ensure all businesses in the arms trade undertake ‘human rights due diligence’ (‘HRDD’), as discussed in Part F below,
- Obligating state regulatory agencies and businesses to take appropriate measures to prevent the illicit diversion of firearms, including by
  - Requiring adequate and timely registers of arms productions and sales;

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<sup>27</sup> For a similar recommendation, see, “Responsible business conduct in the arms sector: Ensuring business practice in line with the UN Guiding Principles on Business and Human Rights: Information note by the UN Working Group on Business and Human Rights,” (2022) 7, <https://www.ohchr.org/sites/default/files/2022-08/BHR-Arms-sector-info-note.pdf>



- Ascribing liability to companies, and potentially directly to managers and directors of those companies, where arms are diverted from the lawful market due to an act or omission of the company;
- Prohibiting insurance companies from covering corporate losses that stem from or are associated with the diversion of firearms;
- Securing access to procedural and substantive remedies for victims of firearm violence, including through both judicial and non-judicial mechanisms.

## **E. Existing Extraterritorial Responsibilities in the Context of the Arms Trade**

19. In addition to measures aimed at addressing the misuse of firearms within the State's territory or under its jurisdiction, the transnational nature of the arms trade requires recognition of States' extraterritorial human rights obligations. Once debated, the existence of at least some extraterritorial human rights obligations is now settled within the jurisprudence of this Court and in IHRL more generally.<sup>28</sup>

20. There is now broad consensus in IHRL that States are required to regulate the extraterritorial conduct and impact of their business nationals when the latter threaten human rights.<sup>29</sup> The underpinning theories behind this obligation vary, and there remains ongoing debate about the boundaries of the obligation. Despite that debate, the consensus amongst at least five UN treaty bodies and most academic commentators agree that an obligation does exist to regulate corporate activities that pose a threat to human rights

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<sup>28</sup> See, e.g., *The Environment and Human Rights*, Advisory Opinion OC-23/17 of November 15, 2017, paras 75-82; Human Rights Committee. *López Burgos v. Uruguay*, UN Doc. CCPR/C/13/D/52/1979, 29 July 1981, paras 12.1-12.3. European Court of Human Rights, *Case of Loizidou v. Turkey* (Preliminary objections) No. 15318/89. Judgment of March 23, 1995, para 62;

<sup>29</sup> See, e.g., Human Rights Committee. Concluding Observations on the sixth periodic report of Germany, UN Doc. CCPR/C/DEU/CO/6, 13 November 2012, para. 16; Human Rights Committee. General Comment No. 36 on Article 6: right to life, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 22; Committee on Economic, Social and Cultural Rights. General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN Doc. E/C.12/GC/24, 10 August 2017, para. 30; Committee on the Rights of the Child. General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights, UN Doc. CRC/C/GC/16, 17 April 2013, para. 43, Committee on the Elimination of Discrimination against Women. General Recommendation No. 37 on gender-related dimensions of disaster risk reduction in a changing climate, UN Doc. CEDAW/C/GC/37, March 13 2018, paras. 43-51; Committee for the Elimination of Racial Discrimination. Concluding Observations on the combined twenty-first to twenty-third periodic reports of Canada, UN Doc. CERD/C/CAN/CO/21-23, 13 September 2017, paras. 21-22.

abroad.<sup>30</sup> The IHRL obligation to regulate transnational activity is particularly clear where, as in the case of firearms, the state is directly and intimately involved in sanctioning a business's activity.

21. In applying this obligation to the firearms sector, it is incumbent upon states to address the impact of the arms trade and:

- Ensure arms export control legislation includes specific references to IHRL and IHL, and acknowledges the independent responsibility on businesses to respect human rights through comprehensive HRDD.
- Ensure those responsible for issuing export licenses are well-trained in IHRL and IHL and have the resources to make comprehensive investigations into particular situations.
- Invite disclosures from civil society and victims to inform decisions on particular export licenses to be issued.
- Cooperate with other states in the development of comprehensive guidance for licensing authorities about the risks to consider when assessing the risks an export with contribute to breaches of IHRL and IHL.
- Transparently disclose risk assessments undertaken as part of the arms export licensing process.
- Ensure that mandatory HRDD legislation and enhanced due diligence for conflict-affected areas (as discussed in Section F, below) applies throughout the business's value chain.
- Ensure that mandatory HRDD legislation has a particular inclusion of the arms sector to avoid any confusion with, or potential conflict with, the export licensing regime.
- Grant victims a right to challenge export licenses.
- Grant victims a right to seek remedies against companies engaged in the arms sector for contributing to IHRL and IHL violations even where the state has issued an export license.

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<sup>30</sup> See, *ibid.*

## **F. The Need to Formally Recognise an Independent Responsibility on Businesses**

22. While the majority of international responsibilities surrounding the arms trade belong with States, it is also necessary to recognise that businesses have an independent responsibility to respect human rights in line with the UNGPs. Recognition of this independent responsibility is important generally as a complement to States' inability or unwillingness to regulate a powerful business, and it is particularly important in a sector like the arms trade where the products are inherently dangerous, where the relationship between the business and the State can be particularly complex, and where the harms to human rights can be particularly severe and may include complicity in war crimes, crimes against humanity, genocide, extrajudicial killings, and torture.

23. This Court has already referenced the UNGPs in its jurisprudence, suggesting a limited need to recite all the relevant expectations. We, therefore, only seek to remind this Court of the key expectations arising from the business responsibility to respect human rights. As the UNGPs indicate, this responsibility involves taking measures to avoid causing or contributing to negative impacts on human rights and preventing or mitigating those impacts the business is "directly linked to their operations, products or services by their business relationships, even if [the business has] not contributed to those impacts."<sup>31</sup>

24. The responsibility to respect human rights applies to all businesses 'regardless of their size, sector, operational context, ownership and structure.'<sup>32</sup>

25. To facilitate the realisation of their responsibility to respect, businesses are expected to:

- (a) Identify and incorporate their commitment to respect human rights in an appropriate policy approved by the most senior level of the business before mainstreaming that policy into its operations and activities throughout its corporate group and value chains
- (b) Develop and implement a process of HRDD, which involves working with affected stakeholders to

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<sup>31</sup> UN Doc. A/HRC/17/31 (2011), Principle 13.

<sup>32</sup> UN Doc. A/HRC/17/31 (2011), Principle 14.

- (1) identify any risks to human rights that the business causes, contributes to, or is directly linked to,
- (2) cease any harms the business is causing or contributing to,
- (3) mitigate any harms the business is directly linked to, and
- (4) remediate any damages already incurred that the business has caused or contributed to.

(c) Employ independent, non-judicial grievance mechanisms (either individually or through an industry-wide initiative) to ensure expedient, accessible resolution of complaints and the provision of remediation where the business has caused or contributed to negative human rights impacts. These non-state, non-judicial mechanisms can be assessed for credibility against UNGPs Principle 31.

26. Given the nature of firearms, it is important to note that in conflict-affected areas, the UNGPs call for enhanced or heightened HRDD. As the UN Working Group on Business and Human Rights and the United Nations Development Programme have collectively indicated, heightened due diligence 'does not specifically entail a different type of due diligence ... but it is built around a concept of proportionality: the higher the risk, the more complex the processes.'<sup>33</sup> In the context of armed conflicts or other situations of widespread violence, heightened HRDD should include a conflict-sensitive analysis that considers how the business interacts with the parties to the conflict to either enhance the conflict in a way that creates new harms, or facilitates breaches of the laws of armed conflict. As the United Nations has produced extensive guidance on the meaning and implementation of heightened HRDD, we would encourage this Court to incorporate that guidance into your Advisory Opinion.<sup>34</sup>

27. Where a business's HRDD or heightened HRDD identifies a large number of risks that it cannot simultaneously respond to, it can adopt priorities that are developed and added to

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<sup>33</sup> United Nations Development Programme and the UN Working Group on Business and Human Rights, *Heightened Human Rights Due Diligence for Business in Conflict-Affected Areas: A Guide* (16 June 2022) at 14, <https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide>.

<sup>34</sup> United Nations Development Programme and the UN Working Group on Business and Human Rights, *Heightened Human Rights Due Diligence for Business in Conflict-Affected Areas: A Guide* (16 June 2022), <https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide>.

over time. According to the UNGPs, a business should first prioritise those risks that are most severe 'or where delayed response would make them irremediable.'<sup>35</sup> Severity can be defined either by the nature of the harm (ie, international crimes and breaches of *jus cogens* norms) or by the number of individuals at risk from the harm.<sup>36</sup>

28. Whether a business owes remedies is dependent on whether the business "causes," "contributes to" a harm or is only "directly linked to" the harm through their business relationships. While most efforts to delineate business's responsibility under the UNGPs rely on examples or analogies, Dr Van Ho's research has sought to clarify the factors that influence a business's responsibility. Her research indicates that whether a business "causes," "contributes to," or is "directly linked to" a harm is dependent on the confluence of five factors:

- (a) its power, either directly over the violation, over a business relationship, or over the conditions that give rise to a harm;
- (b) the independence of its conduct from that of other actors (ie, its ability to act to stop the harm from arising without involving other actors, or its independence to leave a relationship or operational context);
- (c) the predictability of the harm, which helps identify where a business should take additional measures when the harm is more directly caused by another actor (whether a state or a business);
- (d) the severity of the harm, which helps in establishing what measures the business is expected to take when the business has limited power or independence; and
- (e) any mitigation measures the business has taken to address harms directly caused by another actor (or actors).<sup>37</sup>

29. The UNGPs do not require businesses to breach domestic laws, but businesses are expected to comply with human rights where they are allowed to do so even if the State does not require it. As such, the failings of a State to appropriately regulate the firearms industry

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<sup>35</sup> UN Doc. A/HRC/17/31 (2011), Principle 24.

<sup>36</sup> UN Doc. A/HRC/17/31 (2011), Principle 25.

<sup>37</sup> Tara Van Ho, "Defining the Relationships: 'Cause, Contribute, and Directly linked to' in the UN Guiding Principles on Business and Human Rights" 43(4) *Human Rights Quarterly* 625-658 (2021).

or adequately administer the export licensing process cannot excuse the business from engaging with HRDD or heightened HRDD.

30. Applying these standards to the firearms industry would mean that businesses in the arms trade (including those that manufacture parts or components):

- Should express a policy commitment to respecting human rights that is then mainstreamed into their operations throughout their activities and supply chains.
- Develop practices for HRDD, or heightened HRDD where appropriate, that include regular communication and collaboration with affected stakeholders and civil society.

As part of their mitigation measures, businesses should ensure they:

- Design their weapons in a way that minimizes the risks they can be used by civilians to cause widespread and systematic harm.
- Design their weapons in a way that minimizes unintentional misuse by security forces (both police and military).
- Refuse to sell weapons to States or other actors who are likely to directly cause or contribute to human rights violations. This includes refusing requests by State actors for purchases. This would not require refusing compulsory purchase orders.
- Advertise their weapons in a way that minimizes the risks that weapons will be purchased by those who should not have access to them (ie, minors or those with a history of violence), or who are likely seeking them for the purpose of committing human rights violation (ie, those convicted of domestic violence, settlers on indigenous territory, or individuals who express an intent to commit violence).
- Design remediation programmes that can be delivered either by the individual business or through an industry-wide programme.

31. As the recent joint working paper to the Conference of States Parties to the ATT by Austria, Ireland, and Mexico made clear, the business responsibility to respect human rights complements States' obligations under the ATT and IHRL.<sup>38</sup> This position by States aligns with

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<sup>38</sup> ATT/CSP9/2023/AUT-IRL-MEX/774/Conf.WP (10 August 2013).

the authoritative interpretation and application of the UNGPs by the UN Working Group on Business and Human Rights regarding BHR in the context of the arms trade.<sup>39</sup>

32. While the UNGPs are non-binding in their own right, the independent business responsibility to respect human rights also informs the international legal obligations of States by setting the standard of conduct that States should expect of businesses. Moreover, the independent business responsibility to respect human rights has been widely embraced by States and businesses in such a manner that suggests that if it is not yet a general principle of international law or customary international law, it is emerging customary international law. Without necessarily extending the responsibility to all sectors, we believe it would be beneficial and accurate for this Court to recognise an independent obligation on businesses in the inherently dangerous firearms sector to undertake HRDD, and enhanced HRDD in conflict-affected areas.

33. We thank this Court for its attention to this important issue and hope this brief has been of service.



Tara Van Ho  
Co-Director, Essex Business and Human Rights Project  
University of Essex

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<sup>39</sup> “Responsible business conduct in the arms sector: Ensuring business practice in line with the UN Guiding Principles on Business and Human Rights: Information note by the UN Working Group on Business and Human Rights” (2022).